Award No. 5842
Docket No. 5718
2-MKT-CM '70

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee John H. Dorsey when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 8, RAILWAY EMPLOYES' DEPARTMENT, AFL — CIO
(Carmen)

MISSOURI — KANSAS — TEXAS RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That the Carrier violated the controlling agreement when it failed to call any of the regular assigned wrecking crew at Ray Yard, Denison, Texas, to accompany the outfit when the wrecker and three (3) convoys cars were sent to perform service in connection with derailment at Brookshire, Texas on November 5 through the 10, 1967.

2. That accordingly the Carrier be ordered to compensate the following members of Ray Wrecking Crew:

L. W. Sikes	Wrecker Engineer
C. T. Singleton	Ground Man
G. C. Hale	Ground Man
W. N. Whitten	Ground Man
R. M. Anderson	Ground Man
C. M. Marlow	Ground Man

in the amount they would have earned had they been called to perform this wrecking service for such violation.

EMPLOYES' STATEMENT OF FACTS: At Denison, Texas, the carrier maintains a car yard and repair track known as Ray Yard whereat a number of carmen and carmen helpers are regularly employed to perform the work classified as carmens work. The carrier also maintains at Ray Yard, a wrecking derrick identified as No. X-255 and related tool and bunk cars along with a regularly assigned wrecking crew composed of the carmen identified in part two of the employes' statement of claim, set forth herein above. The carmen identified in part two of the employes' statement of claim are herein after referred to as claimants.

On or about November 3, 1967 carrier experienced a derailment near Brookshire, Texas. On November 5, 1967 at approximately 3:30 A.M. the 250

FINDINGS: The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

Within the State of Texas, Carrier has regularly assigned wrecking crews at Denison (Ray Yards), Waco (Bellmead) and Smithville.

There was a derailment, on November 3, 1967, near Brookshire, Texas, on Carrier's main line.

On November 5, 1967, Carrier caused wrecking derrick No. X-255 and three related tool and bunk cars to be moved from Ray Yards, dead-in-Train No. 5, to the site of the derailment. Brookshire is some 385.9 miles from Ray Yards. Regularly assigned wrecking crews having their home stations at Waco and Smithville were used as the wrecking crew on wrecking derrick No. X-255. The derrick and its companion cars returned to Ray Yards November 10, 1967, dead-in-train.

On December 27, 1967, Carmen filed Claim that Carrier's failure to call the regularly assigned wrecking crew at Ray Yards to accompany the derrick and perform the rerailing near Brookshire violated Rule 73(c) of the Schedule Agreement, effective January 1, 1957. The cited provision, which is found under the caption "Carmen's Special Rules," reads:

> "(c) When wrecking crews are called for wrecks or derailments outside yard limits, a sufficient number of the regularly assigned crew will accompany the outfit. For wrecks or derailments within yard limits, carmen will be called to perform the work."

Carrier's defense is that on July 12, 1966, it was agreed by Vice President A. F. Winkle (Carrier's highest officer authorized to make and interpret agreements) and General Chairman O. F. Fike, Brotherhood of Railroad Carmen of America (the only accredited representative of that Organization on the property with whom Carrier negotiates agreements) that Rule 73 was not to be interpreted as being violated if Carrier transferred one of its wreckers, unaccompanied by anyone, from one repair point to another, to be used by the wrecking crew at the second point. General Chairman, in writing, admits and confirms that he orally entered into such agreement.

On April 12, 1967, the General Chairman wrote to Vice President Winkel:

> ". . . during our conference February 14, 1967, I advised you that my Grand Lodge had instructed me to withdraw **my agreed-too (sic) interpretation of Rule 73 of the current agreement as it was incorrect.**
>
> "Therefore, **as of this date, what I agreed too (sic) with you on July 12, 1966** on sending wrecking outfits out without any of the assigned crew in compliance with Rule 73, is withdrawn, and in the future, we expect the Carrier to comply with Rule 73, that is, when any wrecking outfit is called on the MKT for wrecks or derailments outside of yard limits to carry a sufficient number of the regular assigned crew from home station." (Emphasis supplied.)

It is Carrier's position that: (1) agreement having been made between the parties, as to interpretation and application of Rule 73, it could not legally be abrogated by unilateral declaration of the General Chairman; and, (2) by operation of law the proven oral agreement could only be set aside through collective bargaining or in compliance with statutory procedures prescribed in the Railway Labor Act. To this Carmen respond:

> "We vigorously disagree with the Carriers contention that the understanding could only be withdrawn or abrogated pursuant to a section 6 notice under the Railway Labor Act, for the simple reason that the understanding was not arrived at in the first place pursuant to a section 6 notice under the Railway Labor Act. Neither was said understanding ever committed to writing as an agreed-to understanding between the parties. It was purely and simply a verbal understanding made with the Carrier which was later found to be wrong and the Carrier was so advised and put on notice that on and after April 12, 1967, said understanding would not apply. Certainly, verbal understandings cannot be held to supersede the clear and specific terms of a collective bargaining agreement and any argument to the contrary cannot be justifiably upheld."

Section 6 of the Railway Labor Act mandates:

> "SECTION 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an **intended change in agreements affecting** rates of pay, **rules**, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Meidation Board have been requested by either party, or said Board has proffered its services, rates of pay, **rules**, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by Section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board." (Emphasis supplied.)

Simply stated, the issue is whether a verbal agreement, when established by proof (in this case it is admitted) differs in legal force and effect from a written agreement.

It is to be noted that the Rules Agreement effective January 1, 1957, was executed for the Carrier by A. F. Winkel and for the Carmen by O. F. Fike. They are the same two gentlemen who orally agreed to the interpretation of Rule 73, **supra.** Certainly, it is beyond question that by agreement between them they could establish, unequivocally, the intent of the parties at the time of the execution of the January 1, 1957 Agreement as to interpretation and application of Rule 73. This they did to the extent herein material. The issue narrows, and we repeat, to whether the agreement made, because it was oral, could legally be set aside, unilaterally, by one of the parties. Otherwise stated, does an oral agreement, admitted or proven, differ in legal consequences under the Railway Labor Act from a written agreement. Before proceeding to resolution of this legal issue we point out that the process of good faith collective bargaining is a continuing one and its employment by parties is a statutory obligation — the entering into a rules agreement, having no

term, does not stay the obligation to bargain relative to arising new situations or disputes as to interpretation and application of existing agreements. There is ambiguity in Rule 73. The Rule does not spell out its applicability in the factual situation giving rise to this dispute. This, obviously, was evident to the persons who executed the oral agreement of July 12, 1966. They are to be commended for dissipating the ambiguity by agreement through collective bargaining. Further, we note that there is no evidence in this record that the General Chairman's Grand Lodge and what he called his Delegates had any legal standing to veto the agreement entered into by the General Chairman on July 12, 1966. Carrier had and has the right to conclusively presume that the General Chairman was and is the authorized bargaining agent for Carmen held out as having the absolute right to enter into binding collective bargaining agreements with Carrier. A last comment, in the railroad industry identical rules are interpreted and applied in what appears, **prima facie,** to be contradictory interpretation and application. This stems from the peculiar history, tradition and custom on each particular railroad. Even most national agreements, of which there are many, usually make provision, expressed or implied, for recognition of history, tradition and custom on each property in interpretation and application of the agreement on a particular property. It is an over simplification to say history, tradition and custom in the railroad industry, as a whole, prevails. There is no unanimity.

We finally come to pivotal legal issue. Simple contracts are not those of specialty or record. They are the lowest class of express contracts and answer most nearly to the general definition and common understanding of contract.

To constitute a sufficient parol agreement to be binding in law there must be that reciprocal and mutual assent which is necessary to all contracts — this the parties satisfied in the July 12, 1966, oral agreement.

Parol includes oral and written. The only distinction between oral and written contracts is their mode of proof. It is inaccurate to distinguish between oral and written. Contracts are equally verbal whether the words are written or spoken; the meaning of verbal being: expressed in words.

The interpretation given by the parties themselves to a contract in a proven oral agreement will be adopted by the courts.

Section 6 of the Railway Labor Act employs the generic term "agreement". This is inclusive of both written and oral agreements. Each has the same legal force and effect.

We find that there was an oral agreement made between the parties on July 12, 1966, relative to interpretation of Rule 73 applicable in the factual circumstances giving rise to the dispute before us. This agreement, which affects rules (see Section 6 of the Railway Labor Act, **supra**) continues in force and effect under the Railway Labor Act until such time as it is modified or set aside: (1) by agreement of the parties; or, (2) through the procedures prescribed in Section 6 and related Sections of the Railway Labor Act. The position of Carrier in this dispute is well taken. We, therefore, will deny the Claim.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 30th day of January, 1970.

Central Publishing Co., Indianapolis, Ind. 46206 Printed in U.S.A.